85-1202

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ALBERTA BRADFORD, As Executrix
of the Estate of Alex E. Bradford,
Petitioner

v.

BLUE PEARL MUSIC CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

Where a defendant was not personally named or personally served in a copyright infringement case, is it a denial of constitutional due process, where:

1. The District Court amended its order to hold defendant personally liable and allowing plaintiff possessory rights in her personal works without notice, hearing or examination?

2. The dispute in the District Court had been fully adjudicated in 1975 by the appropriate State Court and was *res judicata*, yet the District Court adjudicated the dispute *de novo* with no reason justifying readjudicating the dispute?

3. The subject matter of the

dispute by operation of copyright law never had accrued to plaintiff, yet plaintiff was awarded possessory interests with no basis in law or fact?

4. The contempt order and sanctions were issued at a time when Petitioner had fully complied wdith all orders of the Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No._____

ALBERTA BRADFORD, As Executrix
of the Estate of Alex E. Bradford,
Petitioner

v.

BLUE PEARL MUSIC CORPORATION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Alberta Bradford prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Third Circuit dated July 22, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, entered on March 5, 1984, is reported in 728 F.2d 603 (1984). The Memorandum Opinion of the Court of Appeals dated July 22, 1985 is not reported. These opinions and the Order of the Court of Appeals denying a Petition for Rehearing en banc, entered on September 18, 1985, are set forth in the Appendix.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was dated and entered July 22, 1985. Petitioner filed a timely motion for rehearing en banc which was denied on September 18, 1985

in an order set forth at Appendix A herein. On December 16, 1985, Mr. Justice Brennan entered an order extending the time for filing this petition to and including January 16, 1986 (No. A-471). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision involved is the Fifth amendment to the United States Constitution. The federal statutory provisions involved are the sections of the Copyright Act of 1976: [17 U.S.C. §§ 101, et seq]. This case also involves Rule 60(a) of the Federal Rules of Civil Procedure. The pertinent

texts of the foregoing are set forth in the Appendix.

CONSTITUTIONAL PROVISION INVOLVED

AMEND. V.: "No person shall ... be deprived of ... property without due process of law ...."

STATEMENT OF THE CASE

The Petitioner claims that the procedure bywhich she was made a party defendant, subjecting her personal assets to seizure,denied her federal due process. Specifically, she claims:

1. That the Court has taken away property interests in protected works which she authored;

2. That the Court has taken the property interests in protected works which she co-authored; (A32)

3. That the Court has taken beneficial interests in protected works which she acquired by operation of law. (A31).

Petitioner was never given an opportunity to be heard or to defend as to items #1 and #2. These interests were not brought into the law suit until the judgment was amended to add Petitioner as a party and attach her personal assets to satisfy the judgment against the Estate. As to item #3 Petitioner, in her capacity as Administratrix of the Estate, made numerous requests of the Court to be heard as to the rightful ownership of Estate assets. She was unsucessful.

This dispute concerns the right, title, and interest to musical works created by the late Alex Bradford. Although ownership interests in these works was settled during his lifetime, following suit instituted by Blue Pearl and its principals, (A37), another complaint making the same allegations was commenced on February 23, 1981. The suit was instituted against the Estate of Alex Bradford, solely. The Administratrix of the Estate is your Petitioner. Then counsel for Petitioner, Steven Seklir, Esq.* officially entered his appearance on her behalf. He abandoned Petitioner and default was entered against the Estate for failure to answer or otherwise defend the law suit. A

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* Member of New York Bar

judgment for damages was entered against the Estate on December 1, 1981. The District Court denied applications to vacate the default judgment, permitting the Estate its day in court. Challenges to the jurisdiction, assumed by the District Court, were not sustained. The Estate was ordered to relinquish all right, title, and interest in the works of Alex Bradford in its possession to Blue Pearl. Only two works were specified*. Vague reference was made about rights to other unidentified works. Despite this lack of specificity,

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* "Your Arms Too Short to Box with God" and "Don't Cry Mary/What's A Friend For"

the fiduciary of the Estate was ordered to "recreate" works which were not in possession of the Estate but to which Blue Pearl claimed ownership.

On January 25, 1983, the District Court held petitioner in contempt of Court, for failing to recreate unspecified works of Alex Bradford. On March 29, 1983 sanctions upon this contempt order were levied aginst petitioner at $50.00 per day unless petitioner delivered and recreated works of Alex Bradford. Petitioner had delivered everything in her possession to Blue Pearl. This order was appealed on March 5, 1984, the Third Circuit reversed the order of recreation and remanded for further proceedings consistent with its mandate. (A35).

The Court made no findings regarding Petitioner's contention that all aspects of the District Court's order had been complied with prior to the entry of the order of contempt. The order of contempt remains open of record. On remand, there were no additional proceedings. An order comporting with the decision of the Third Circuit Court of Appeals, prepared by Petitioner's counsel, against the Estate of Alex Bradford, solely was entered of record, on September 24, 1984. The Court vacated this order upon Blue Pearl's exparte application. Blue Pearl submitted a substitute order. This order was entered on October 30, 1984, solely against the Estate of Alex Bradford. The Court gave no basis for the substitution of orders.

Thereafter, Blue Pearl applied to the District Court to amend its judgment entered solely against the Estate of Alex Bradford, to add petitioner as a party defendant and as such individually liable for the debts of the Estate. Plaintiff's application was made in violation of Rule 60 which required leave of the Court of Appeals before jurisdiction could be properly invoked. Over Petitioner's objections she was made a party, the court finding that she was not personally named nor served with process excuseable as a clerical mistake under Rule 60(a).

The litigation was four years in duration and in that time no order or judgment of the Court had been entered assessing personal liability against During this four year period, Blue Pearl

made no motion to amend the pleadings to name petitioner as a party, in any individual capacity. Only one summons and one complaint issued in this matter and that was against the Estate of Alex Bradford. Service was made upon the fiduciary of the Estate.

On appeal the District Court's judgment was affirmed. Petitioner's petition for rehearing and reconsideration requesting the court to relieve petitioner of the order of contempt reversing the judgment adding her individually and requesting that the application of the doctrine of res judicata be made applicable to this matter was denied, September 18, 1985. Mr. Justice Brennan granted petitioner an extension of time in which to file a writ certiorari.

REASONS FOR GRANTING THE WRIT

The decision of the Court below not only misapplies well-established principles governing res judicata, and the appropriateness of adding an individual as a party to a law suit, but also reflects fundamental misunderstanding of the critical importance of the procedural safeguards petitioner seeks. There are several property interests protected by federal copyright law in the numerous artistic works involved in this case. Rights which petitioner has in her individual original works; other interests which she co-authored with her late husband; and beneficial interests which she is entitled to under the New Jersey State law of intestate sucession.*

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* N.J.S. Title 3A

The decision below, denying petitioner an opportunity to prove at trial that the procedure she seeks is necessary for the protection of her substantive rights, has devastating results. She has lost invaluable property and earnings therefrom; she has been effectively stripped of her ability to earn a living in her craft, all without notice and opportunity to be heard. A clear denial of due process.

"The standards of procedural due process are not absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." Ferguson v.Thomas 430 F.2d 852 (5th Cir., 1970). It is "fundamental," says the Supreme Court, "that the right to

notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, (1972), reh. den., 409 U.S. 902. In Board of Regent v. Roth 408 U.S. 564 (1972) quoting Boddie v. Connecticut, 401 U.S. 371 (1971), this Court held that before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing ..." [Emphasis supplied] Moreover, insofar as the Court below held that service of a summons and complaint, upon an estate through its fiduciary, is notice of the right to defend against the taking of individual assets never belonging to the estate, the decisions have significant implications for other jurisdictions and the public at large.

Apart from the broad social and economic impact of the decision below, as shall be shown hereinafter, that decision is in conflict with applicable decisions of this Court; and in reaching that decision, the lower courts have so far departed from constitutional procedural standards that exercise of the corrective supervisory power of this Court is imperatively required.

1. The Court lacked jurisdiction to take the individual, beneficial interest acquired by petitioner through operation of law

Under the Copyright Act of 1976, [17 U.S.C. §§101, et seq.], there are only a few specified methods by which ownership in artistic works can be had. They are as the author or composer 17 U.S.C.

§ 201(a), by voluntary assignment, mortgage, or conveyance, 17 U.S.C. § 101; through inheritance, 17 U.S.C. § 203(a)(2)(A) and § 101, or bankruptcy, 17 U.S.C. § 201(e).

Blue Pearl claims ownership, by assignment, in those works which devolved to petitioner by operation of law. The Copyright Act of 1976 requires that recordation of the transfer or assignment must precede the institution of an action for copyright infringement. The applicable statute is set forth in Appendix A33. This provision of the Act has been interpreted as a jurisdictional prerequisite to institution of infringement proceedings. Lone Ranger Television, Inc. v. J.L. Productions, Inc., 740 F.2d 718 (9th Cir., 1984); Ruskin v. Sunrise Managements, Inc., 506 F. Supp

1284, 1288 (DC Colo., 1981); Burns v. Rockwood Distributing Co., 481 F. Supp. 841,847 (ND Ill., 1979). A party invoking the District Court's jurisdiction for the first time must clearly show that his action is within the court's jurisdiction. Davis v. Ohio Barge Line, Inc., 697 F.2d. 549 (3d Cir., 1983), citing with approval Chassis v. Progress Manufacturing Company, Inc., 382 F.2d 773 (3d Cir., 1967), and that the jursidictional basis must be affirmatively alleged. Patton v. Baltimore & Ohio Rail Company, 197 F.2d 732, 743 (3d Cir., 1952).*

* In Blue Pearl v. Janco, et al, 82 Civ. 2115, where the issue of ownership interest in works of the Estate of Alex Bradford was brought by this respondent and is still pending, the Court found it lacked jurisdiction over the matter as Blue Pearl had no recorded interest. A new complaint had to be filed.

Respondent did not record the alleged transfer, as mandated. Moreover, Respondent admitted that Alex Bradford, during his lifetime, never executed any document assigning ownership interests to Blue Pearl in works which he authored. As the widow and sole heir of the Estate of Alex Bradford, petitioner's right, title and interests are protected by the Copyright Act. The court's judgments were entered when it had acquired neither jurisdiction over the subject matter nor the person.

2. The Court lacked the jurisdiction necessary to divest petitioner of her individual interests in works which she co-authored with Alex Bradford. Likewise, the independent, individual interests in those works which petitioner singularly authored could not be affected.

Certiorari should be granted to allow this court to pass on the important issue of whether the Court acquired jurisdiction over the petitioner in any individual capacity where the summons and the complaint, as in this case, named and effectuated process solely upon the estate of Alex

Bradford. Further, this court should decide whether the court erred in construing the service of process upon the fiduciary of the defendant estate as noticed to petitioner of her individual liability. The Third Circuit in its decision of July 22, 1985 (App. A) held that such notice was sufficient. The Court in no way defined or distinguished the several individual rights at issue. Individual, in this context, has at least three distinct and separate references, each with a separate legal significance.

1. First, Petitioner owns works which she singularly authored. By applicable law these rights cannot be transferred involuntarily to anyone without petitioner's knowledge or consent. 17 U.S.C. § 201(e). These

rights were never under contract with Blue Pearl. There was never a relationship between petitioner and Blue Pearl cognizable at law with respect to petitioner's individual rights.

The Third Circuit acknowledges that petitioner is an artist in her own right. However, the court does not distinguish those rights individual to petitioner thus allowing them to be subsumed under the existing order.

2. Second, Petitioner has interest in joint works created with her late husband. As to these joint works petitioner shares original ownership interests as provided under 17 U.S.C. § 201(a). These rights are created by statute and as such petitioner cannot be divested of them without adequate notice, and an opportunity to present

evidence as required by Constitutional due process. Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, one author cannot divest another author of her individual interests, as each author is the owner of ... "interdependent parts of the unitary whole."*

3. Third, Petitioner acquired beneficial interests in her husband's works as his widow.

The Court fails to recognize these distinctions and, in effect, rules that each individual interest can be given to Blue Pearl by amending the judgment. The error below begins with the Court's failure to distinguish between each separate interest which

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* House Report on the Copyright Act of 1976, 94th Congress, 2d Session, Report No. 94-1476, p. 120

Petitioner owns or otherwise acquired, and those before the court.

The settled law in the state of New Jersey attaches liability to the parties in the character in which they sue or are sued. One who is a party in the capacity of executor, trustee, etc. is not bound by the judgment in an individual capacity. Miller v. Stieglist, 113 N.J.L. 40 (1934).

3. Failure to apply the doctrine of res judicata below rendered the decision out of conformity with cases of the Supreme Court and Circuits which hold that issues raised previous can not be relitigated.

Petitioner claims that the Third Circuit found as a matter of fact that another Court, prior to the institution

of this action, had disposed of all the issues raised in this case involving the same parties remains uncontraverted. Indeed, the Court admitted that its previous opinion "... did set forth the history of litigation between the parties. See Blue Pearl Music Corporation v. Alberta Bradford, as Administrtrix of the Estate of Alex Bradford, 728 F.2d at 604-605 n.2, ... "The litigation was resolved in settlement.* The case was dismissed with prejudice.*

> "In 1976 Burkett and Becker filed an action in Superior Court of New Jersey, Chancery Division, Union County, individually and as shareholders, suing on behalf of Blue Pearl, against Bradford,

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* Burkett v. Bradford, et al., Superior Court of New Jersey, Chancery Division, Union County, C-1990-75.

> Bradford's interest in Blue Pearl, and Broadcast Music, Inc. (BMI), arising out of Bradford's breach of his contract with Blue Pearl, his representing himself as sole owner of rights to his compositions, and his purporting to license compositions to BMI. That action was eventually settled. [Emphasis supplied] ***"

This finding of fact required that the Court to apply the principle of res judicata.

This Court has held "that a Federal Court must give to a State Court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367, 1372 n.9 (1984). City Migra v. Warren City School District Board of Education,

_____, U.S. ___, 104 S. Ct. 892, (1984). In the State of New Jersey a judgment of dismissal with prejudice is a valid final judgment and can not be relitigated. Said judgment is "... conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding." Woods Exploration and Producing Company v. Aluminum Company of America, 438 F.2d 1286, 1312-13 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), cert denied, 404 U.S. 1047 (1972), (quoting 1 B Moore, Federal Practice ¶ 0.405[1] at 6240). First Alabama Bank v. Parsons Steel, Inc., 747 F.2d 1367 (11th Cir. 1984), cert. granted, (U.S. Appeal pending #84-1616); Elliott v. The University of Tennessee, et al., 766

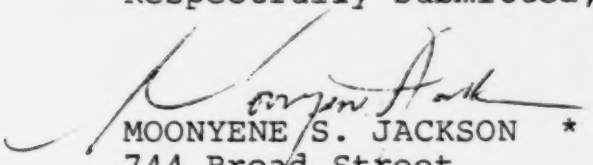
F.2d 982 (6th Cir. 1985), cert granted, (U.S. Appeal pending #85-588) Hayman Cash Register Co. v. Sarokin, 69 F.2d 162 (3d Cir. 1982). The Third Circuit's decision in this case contravenes established decisional law and fails to maintain uniformity in its decisions.

This Court has granted Cert when a lower court, as is the case herein, has imporperly ignored its decision local or toherwise applicable law: Pecheur Lozenge Co., Inc. v. National Candy Co., Inc., 315 U.S. 666 3rd Cir., (1942.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari issue.

Respectfully submitted,



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APPENDICES

APPENDIX A

MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED July 22, 1985

Sloviter, Circuit Judge.

The principal issue in this appeal is whether the district court abused its discretion in correcting a judgment previously entered against appellant Alberta Bradford in her fiduciary capacity to include Alberta Bradford in her individual capacity. Also at issue is wnether the court's substituted order on remand is consistent with this court's mandate.

The facts can be briefly related, since they are covered in the prior reported opinion of this court. Alex E. Bradford, Alberta's husband, held the copyrights on a number of musical compositions, including two musicals,

"Your Arm's Too Short to Box with God" and Don't Cry Mary, or What's A Friend For?" As alleged in Blue Pearl's complaint, filed February 23, 1981, to which no answer was filed, Alex Bradford entered into a series of agreements between 1974 and 1976 pursuant to which Blue Pearl Music Corporation obtained all rights to Alex Bradford's musical compositions. In exchange, Alex Bradford received a one-third share of Blue Pearl. Alex Bradford died intestate in February 1978; Alberta Bradford was his sole heir. The complaint further alleges that Alberta Bradford infringed Blue Pearl's copyrights by performing these works and licensing their performance without Blue Pearl's consent or authorization.

Mrs. Bradford filed no appearance or

answer, and the district court entered a default judgment for Blue Pearl on June 26, 1981, affording declaratory and injunctive relief. A magistrate's report recommended damages in the amount of $105,000, plus fees and costs, and this recommendation was adopted by the court which entered judgment in this amount for Blue Pearl on December 1, 1981. On November 19, 1982, Bradford filed a motion to vacate the default judgment and to restore the matter to the active calendar, which was denied on January 17, 1983. In the meantime, Blue Pearl had filed a cross-motion to hold Mrs. Bradford in contempt for failure to obey the earlier order. On March 29, 1983, after a hearing, sanctions of $50 a day were imposed, and Mrs. Bradford, a composer in her own right, was ordered

to re-create certain works. Mrs. Bradford appealed from both of the district court's orders. We affirmed the order imposing contempt sanctions but vacated the portion of that order that required her to re-create her husband's copyrighted works. Blue Pearl Music Corp. v. Bradford, 728 F.2d 603 (3d Cir. 1984).

On remand, the district court initially entered the order proposed by Bradford's attorneys, and then, on motion of Blue Pearl, substituted an order prepared by Blue Pearl's attorneys. At about the same time, the court granted Blue Pearl's Rule 60(a) motion to correct the judgments previously entered to include Alberta Bradford individually as well as Alberta Bradford as Executrix of the Estate of Alex E.

Bradford. Bradford contends that in so doing the district court abused its discretion.

Fed. R. Civ. P. 60(a) authorizes the district court to correct "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." Although the caption in the complaint, and the judgment that was taken therefrom, named Alberta Bradford in her fiduciary capacity only, the complaint, aside from the caption, clearly states claims against Bradford individually. See ¶¶ 18-22, 26, 34-37, 42-43, 46, 50-51, and the claims for relief. Not only does the complaint expressly state that Bradford individually is being sued, it clearly seeks to prevent her individually, and not as executrix of the

estate, from infringing the copyright. Thus, we agree with the district court that Alberta Bradford had adequate notice of her individual liability.

We also reject appellant's suggestion that Rule 60(a) may not be used to amend the judgment in this manner. In Fluoro Electric Corp. v. Branford Associates, 489 F.2d 320 (2d Cir. 1973), the district court granted a Rule 60(a) motion substituting "Branford Associates" for "Branford Associates, a corporation." The defendant appealed, claiming that the jury verdict ran only against the corporate defendant and that the plaintiff was trying to enforce its judgment against a party that was never served and never participated in the action. The Second Circuit, however, rejected the claim that there were two

separate entities and upheld the district court's order. 489 F.2d at 325-26. We find the Fluoro court's reasoning persuasive and see no plausible argument for distinguishing that case from the present one.

We also find that the district court did not abuse its discretion in substituting one order for another on remand. The issue in essence is whether the new order conforms to this court's mandate, see Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967). The district court gave no reasons for its action, but Blue Pearl contends that the order submitted by Bradford was vacated because it "improperly reache[d] far beyond this Court's Judgment." We thus turn to consider the three pertinent respects in which the order prepared by

Bradford differs from that prepared by Blue Pearl.

The first order (the Bradford order) limited the affirmance of the district court's order of March 29, 1983 to the two plays, "Your Arm's Too Short to Box with God" and "Don't Cry, Mary, or What's a Friend For?" Bradford argues that in this court's earlier opinion, we concluded that Blue Pearl's interest was limited to these two works. She points to the language in that opinion where we stated:

> The record seems to indicate that there may be other works of Alex Bradford that have been lost, but if it is these unnamed musical works that are the subject of the district court's re-creation order then the order is too vague to survive appellate scrutiny.

728 F.2d at 606 n.3. If read in context, it is apparent that footnote in which this language appears was focusing on the re-creation of copyrighted material ordered by the district court and not to the scope of the ownership interests acquired by Blue Pearl. In fact, earlier in the opinion, we stated, "Blue PEarl acquired the copyrights to Bradford's musical compositions, including all rights to promote, license, or otherwise control them." Id. at 604.

The second major difference between the first and second order entered after remand was that the Bradford order contains language regarding the settlement of prior litigation between the parties, whereas such language is excluded in the court's substituted

order. Although our opinion did set forth the history of litigation between the parties, see 728 F.2d at 604-05 n.2, there was no need to include any reference thereto in the district court's order. The district court did not abuse its discretion in entering an unembellished order.

Finally, the Bradford order seems to vacate the March 29, 1983 order in its entirety whereas the order eventually entered vacates it only "insofar as it requires defendant Alberta Bradford to recreate [sic] her deceased husband's copyrighted works." It thus leaves in effect the portion of that order adjudicating Bradford to be in contempt. Bradford complains that this leaves the situation in "one of limbo" as to the order of contempt. We do not agree. In

Blue Pearl I, we vacated only the portion of the March 29, 1983 order requiring re-creation, affirming the remainder. Thus, the order ultimately entered by the district court was in compliance with the mandate.[1]

Since the order ultimately entered by the district court is consistent with our earlier judgment, there is no basis for finding an abuse of discretion. The orders of the district court will be affirmed.

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1. We do not construe the appeal before us to raise any issue as to the imposition of monetary sanctions for the contempt, and the briefs do not focus on whether the daily sanction is accruing. We therefore do not address that issue.

TO THE CLERK:

Please file the foregoing opinion

_____

Circuit Judge

APPENDIX B

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5825

BlUE PEARL MUSIC CORPORATION

v.

ALBERTA BRADFORD ET AL.,

Appellant

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, ADAMS, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSAMNN, Circuit Judges.

The petition for rehearing filed by Appellant, Alberta Bradford, as Executrix of the Estate of Alex E. Bradford,

in the above-entitled case having been

submitted to the judges who participated

in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: September 18, 1985

APPENDIX C

AFFIDAVIT OF ALBERTA BRADFORD
IN SUPPORT OF MOTION FOR
RE-ARGUMENT

Dated January 31, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BlUE PEARL MUSIC CORPORATION

Plaintiff,

vs.

ALBERTA BRADFORD, As Executrix, (Administratrix) of the Estate of Alex E. Bradford, Deceased,

Defendant.

STATE OF NEW JERSEY)
)SS:
COUNTY OF ESSEX)

ALBERTA C. BRADFORD, being duly sworn according to law upon her oath, deposes and says:

1. I am the defendant administratrix of the estate of Alex E. Bradford in the above-entitled action.

2. I make this affidavit to clarify certain matters raised and to set forth other important facts. I hav been out of the country on an engagemer As a performing artist, I make my livir through engagements such as these. However, in accepting this particular engagement, I have not been available t my attorney as I would have liked to have been.

3. In 1979, in this court, in a law suit involving the rights of the music of my late husband, Alex E. Bradford, I was advised by my then attorney to settle the matter. I followed his advice and since I am not well-versed in the law, I did not know

that I could have also claimed entitlement to those musical works of Alex's which I had in fact completed, or otherwise contributed to. I only thought that a person could claim entitlement for works that he or she had begun. My former attorney(s) never asked me questions to make me realize that Blue Pearl was not the owner of everything. Until recently, I was never made to understand my recourse. As part of entering into the settlement in the 1979 case, I did not realize that I could legally claim any rights that I personally may have in the music because I was never told that by any lawyer. I have since learned that my contributions to many of Alex's works are rights that I am entitled to.

4. There are songs in this present

law suit which I completed or otherwis
contributed to. One such song referre
to as "Follow My Jesus" was actually a
song entitled "Following Jesus" which
completed after Alex's death. Several
witnesses were present when I complete
this work who can attest to this fact,
among them Charles Campbell, who was
also a member of the Creative Movement
Repetory Company, a performing group
which Alex had founded. "Following
Jesus" was performed by Creative
Movement as part of the music for the
show "Don't Cry Mary, What's a Friend
For". The songs "We Come" and "I Know
He Shall Rise Again" were also part of
this musical work. I completed "We
Come" about the same time as "Followin
Jesus". "I Know He Shall Rise Again"
was completed by me about 1977 at a

rehearsal of Creative Movement which took place at the Y.M.C.A. in Newark, New Jersey. Among the members of Creative Movement which can attest to this fact are Gwen Fleming, Edward Fleming and William Nelson.

5. In addition, all of the piano arrangements for the music in "Don't Cry Mary" were created by me, as were all of the piano arrangements for the original version of the show "Your Arms' Too Short To Box With God" (referred to as "Box"). The renowned composer, educator, Dr. Billy Taylor can attest to that fact, as he prepared the lead sheets for "Box" from a tape of my piano arrangements for the original production. In addition, I created and

and taught to the members of Creative Movement all of the choral arrangements and choral background for "Don't Cry Mary". Many more of the members of Creative Movement can further attest to that.

6. I have been playing the piano since age three (3) and first began arranging and teaching my arrangements to choirs at age seven (7). I could not read the music, but sang from the Baptist Hymnal and played my own arrangements of the songs. I began composing my own original gospel songs at about the age of twelve (12). Since that time I have been actively involved in the music industry as a singer and pianist, arranger and composer, director and conductor. On an album entitled, "Keep On Praying", Alex recorded songs

composed by me and sung by him and the singing group known as the Bradford Singers. I have worked and recorded on other albums with Alex as a vocalist and pianist, teaching the arrangements to the other musicians on the recording dates. In addition, Alex and I worked together as A & A Music Enterprises. I frequently completed music which he began for A & A. Some of those songs were also included in various versions of "Box".

7. When Vinnette Carroll of the Urban Arts Corps, and the director of "Box" was originally mounting her version of "Alice in Wonderland" in the late 1960's or early 1970's, she called Alex to come and arrange for the company a gospel version of a ballad in the show called "Father William". Alex agreed to

arrange the song, but came down with an attack of gout and could not go. He sent me in his stead. At the rehearsal, I arranged and taught "Father William" to the cast, in the presence of Vinnette Carroll. The cast of "But Never Jam Today" as the production was called, included Sherman Hemsley and Judith Jamison.

8. When Vinnette Carroll re-mounted "But Never Jam Today" in 1978, my arrangement was again in the show. This time, I performed it with the company. Blue Pearl's president, Richard Becker heard the song and asked if Blue Pearl could publish my music, especially "Father William" because he said he knew I was a great talent in my own right and during that conversation also said that I would have the same

working relationship that he and Alex shared; that he and I would share publishing royalties, but that I would also receive writer's royalties as Alex had received.

9. I understand that in this present action, Blue Pearl seeks to have itself named as owner of all of Alex's Music. However, there are works which I feel I am entitled to share not only as the heir to Alex's estate, but also personally and individually based upon my contributions to these works. I never agreed to have Blue Pearl own or publish my music, so they should not be allowed to take entitlements away from me.

10. I also understand that in this present action, Blue Pearl seeks to hold me in contempt of court for failing to

turn over to them lead sheets and other written music which belonged to Alex. I have none of that music or lead sheets.

11. At the time of Alex's death, he and I were not living together. I have since been told that there were many items which were removed from the home, including music and other written documents shortly after his death. It is my understanding that most of these items were taken by relatives of Alex's who thought they were entitled to these things, or thought that I should not have them. Access to the home was fairly easy, since some of his relatives lived, at that time, on the second floor. One of Alex's nieces took music, tapes, as well as other writings when she moved from the home to California. Two of the members of Creative Movement

went to visit her in California and can attest that they saw some of these items which belonged to Alex.

12. In February 1978, in the midst of Alex's illness and subsequent death, in handling the estate, and not being familiar with the copyright laws, some of the registration for the music may be erroneous. However, by registering these works in Alex's name, I never intended to give up my entitlements.

13. Although Alex and I worked very closely together as artists, I was not involved in his day-to-day business affairs. I knew that he had some sort of business arrangement with Blue Pearl and Richard Becker as his music publisher, because Alex had always been interested in having his music published. My understanding of music publishing,

which was further explained to me by Richard Becker, was that the publisher and the writer equally share in the income from any of the songs. Richard Becker had further stated that, after Alex's death, I would continue to receive Alex's writer's share of any royalties as well as whatever interest that Alex had in Blue Pearl.

14. I have not received any monies, royalties or payment from Blue Pearl or from any of Alex's music since 1980. Both of my daughters depend upon me; one is in fact a full-time college student. In addition, there are household expenses which now exceed my ability to pay. Should I be further denied the ability to receive the royalties and monies due the estate and further denied those monies which may be due to me as a

contributor to some of the music in question, my family and I would suffer extreme hardship.

15. I do not know exactly how much money I am entitled to at this point. However, I do know that the show "Box" has been on Broadway and has enjoyed numerous successful national tours and bus-and-truck tours since 1980. Were Alex alive, he would have been entitled to share in the gross box office receipts which, according to Variety magazine, a trade newspaper, frequently exceeded $65,000 per week. As heir to his estate, I am entitled to Alex's share of royalty income from this show, as well as income from the sale of the cast album, music song book, and souvenir books. I am also entitled to a percentage of the publishing, according

to the purported documents with Blue Pearl.

16. I have been denied these royalties, as well as whatever royalties which I may be personally entitled to, which has caused my family and myself to suffer extreme financial harm.

17. In attempting to defend the past law suits brought by Blue Pearl, I have paid over $28,000 in legal fees. One of my former attorneys, Mr. Harvey Weiss, recommended at one point that I give him the balance of whatever royalty income I had received prior to 1980 for him to "hide" it from any possible judgments by Richard Becker or Blue Pearl. On his advice, I gave him approximately $20,000 which I had had in investments. When I later asked him to return the money, Mr. Weiss gave me a

statement for services rendered which amounted to the approximate amount which I had entrusted to him. At that point, I felt that he was not acting in my best interest and had been grossly unfair to me. I decided to find another lawyer.

18. My next lawyer, Mr. Steven Seklir, was paid approximately $2,500, but, I understand, did not respond to the complaint in this present action which resulted in a default judgment against me. I have been going from one lawyer to another almost as a spinning top and now I finally find that if given the opportunity, I can claim and prove what is rightfully mine. The court has ordered me to tell the world that Blue

Pearl is the owner of Alex's music, but there are rights which I feel are owed to the estate and to me as Alex's representative.

(L.S.) ALBERTA C. BRADFORD

Sworn and subscribed to
before me this 31st day
of January 1983.

An Attorney at Law
State of New Jersey

APPENDIX E Relevant Sections of the Copyright Act of 1976

17 U.S.C. § 101

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

17 U.S.C. § 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic

works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works; and

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Pub.L. 94-553 Title I, § 101, Oct. 19, 1976, 90 Stat. 2544.

17 U.S.C. § 201. Ownership of copyright

(a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

17 U.S.C. § 102(e).

(e) Involuntary Transfer. When an

individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title except as provided under Title 11.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2568. As amended Pub.L. 95-598, Title III, § 313, Nov. 6, 1978, 92 Stat. 2676.

17 U.S.C. § 205.

(d) Recordation as Prerequisite to Infringement Suit. No person claiming by virtue of a transfer to be the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument under which such person claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

APPENDIX E

F.R.C.P. 60(a):

Clerical mistakes in judgments, orders, o other parts of the record and errors therein arising from oversight or omissio may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

APPENDIX F:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 83-5139 and 83-5237

BLUE PEARL MUSIC CORPORATION,

Appellee

v.

ALBERTA BRADFORD, as Administratrix of
the Estate of Alex E. Bradford, Deceased,

Appellant

On Appeal from the United States
District Court for the
District Court of New Jersey
(D.C. Civ. No. 81-537)

Argued January 27, 1984

Before: GIBBONS and BECKER, *Circuit Judges*
and DUMBAULD, *District Judge*•

(Filed March 5, 1984)

FREDERICK L. WHITMER (Argued)
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Attorney for Appellee

• Honorable Edward Dumbauld, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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Attorneys for Appellant

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is a copyright infringement case that presents the question whether a court can order an infringer of a copyrighted musical work to re-create the work on pain of a contempt penalty because the copyright owner has lost all its copies of the work. Appellant Alberta Bradford is the executrix of the estate of her husband, Alex E. Bradford, who was the composer of the musical plays *Your Arm's Too Short to Box with God* and *Don't Cry Mary, or What's a Friend For*, both of which are involved in this lawsuit.[1] The two questions raised by these appeals -- the first relating to the correctness of the denial of Mrs. Bradford's Rule 60(b) motion, and the second concerning the re-creation issue mentioned above -- can be understood only against the background of the complex procedural history of this case, to which we now turn.

I.

Plaintiff, Blue Pearl Corporation, was organized in 1975 and was originally owned equally by three

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1. *Your Arm's Too Short to Box with God* was a Broadway hit and has had at least one nationwide run.

shareholders, Richard Becker, Newton Burkett, Jr., and the composer, Alex E. Bradford. By assignment from Bradford, Blue Pearl acquired the copyrights to Bradford's musical compositions, including all rights to promote, license, or otherwise control them.

On February 27, 1981, after two prior lawsuits,[2] Blue Pearl filed suit against Alberta Bradford as executrix of the estate of her late husband, claiming continuing infringement of Blue Pearl's copyright to Alex Bradford's musical compositions. No appearance was entered on Mrs. Bradford's behalf in this suit and on June 26, 1981, the district court entered a default judgment against Mrs. Bradford. The court enjoined Mrs. Bradford from further infringement of plaintiff's copyright, directed her to turn over all lead sheets and other copyrightable materials in her possession to Blue Pearl, and required her to provide written notice of Blue Pearl's copyright to certain music publishing

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2. In 1976 Burkett and Becker filed an action in Superior Court of New Jersey, Chancery Division, Union County, individually and as shareholders, suing on behalf of Blue Pearl, against Bradford, Bradford's interest in Blue Pearl, and Broadcast Music, Inc. (BMI), arising out of Bradford's breach of his contract with Blue Pearl, his representing himself as sole owner of rights to his compositions, and his purporting to license compositions to BMI. That action was eventually settled.

   In 1978 Becker purchased Burkett's one-third interest in Blue Pearl. In 1979 Blue Pearl filed a copyright-infringement action in the District Court for the District of New Jersey against the present defendant Alberta Bradford and the estate of Alex E. Bradford. Defendants filed a third-party claim against Becker. In a settlement conference before a magistrate, Mrs. Bradford acknowledged that Blue Pearl was the sole owner of all rights to Bradford's compositions. This action was also eventually settled.

companies that Blue Pearl would identify. The final order also provided for a hearing on damages.

On November 12, 1981, the damages hearing was held. Mrs. Bradford again did not appear. On November 20, 1981, the magistrate issued a report and recommendation concluding that Blue Pearl had established seven separate instances of infringement by Mrs. Bradford, and that on each occasion Mrs. Bradford willfully infringed Blue Pearl's copyright. The magistrate recommended an award of damages pursuant to 17 U.S.C. § 504(c) in the amount of $105,000. The district court adopted the report and recommendation and entered judgment in favor of Blue Pearl on December 1, 1981.

On November 19, 1982, Mrs. Bradford finally responded to Blue Pearl's lawsuit by filing an "Answer and counterclaim and demand for jury trial" and a separate "Motion to vacate and set aside judgment of damages and motion to vacate and set aside default judgment and to restore the matter to the active calendar." Blue Pearl made a cross-motion to hold Mrs. Bradford in contempt of court and for sanctions for her breach of the provisions of the June 1981 judgment. After a hearing the district court denied Mrs. Bradford's rule 60(b) motion to vacate and, on February 8, 1983, granted Blue Pearl's cross-motion for contempt. Mrs. Bradford has appealed both decisions.

II.

The first question presented by these appeals is whether the district court erred in denying Mrs. Bradford's motions under Rule 60(b) to vacate the default judgments enjoining her from further infringement of Blue Pearl's copyright and awarding damages. The district court's denial of the appellant's Rule 60(b) motion is reviewable only for abuse of discretion. *See In re Eastern Sugar Antitrust*

Litigation, 697 F.2d 524, 528 (3d Cir. 1982). We have carefully reviewed the record -- the convoluted history of this case is adumbrated above and is more fully set out in the district court's comprehensive opinion -- and conclude that, because of Mrs. Bradford's dilatory conduct and the lack of any justification for opening the judgment at this late date, the district court did not abuse its discretion in refusing to vacate the default judgments.

III.

We have substantially more difficulty with Mrs. Bradford's second point, which arises in connection with her appeal from the district court's March 2, 1983, order and judgment holding her in contempt for failing to comply with the June 26, 1981, default judgment. Our concern centers on that portion of the contempt order that states:

> IT IS ORDERED, ADJUDGED AND DECREED that, pending full compliance by defendant Alberta Bradford with this court's order of June 26, 1981, by delivering to plaintiff of all copyrighted materials in her possession or *by recreating* all copyrightable materials which were previously but are no longer in her possession and delivering same to plaintiff, including tapes of the materials, defendant Alberta Bradford shall deliver to the clerk of this court $50.00 for every day that she fails to comply with this order for as long as she remains in contempt until further order of this court, ... (emphasis added).

This order to re-create is not subsumed in either of the previous orders of the district court and therefore the appeal is timely.

In answer to our request for supplemental briefing on the issue of the authority of the district court to

order a copyright infringer to re-create a copyrighted work,[3] the parties have been unable to cite us to any authority in either the copyright caselaw or any analogous area of the law that holds that the district court can order such relief.

This case is somewhat analogous to cases that discuss the availability of specific performance for breach of a personal services contract. The leading case that discusses the propriety of a court decree that orders a party to perform personal services is the classic contract-law case of *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (court cannot order opera singer to sing). *Lumley* stands for the time-honored common-law rule that a plaintiff can recover damages for breach of a personal-services obligation, but a court will not order specific performance. *Lumley* and its progeny thus do not aid Blue Pearl.

Furthermore, there is nothing in the record that

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3. In addition to the question of the general propriety of an order to re-create a copyrighted work, we are also troubled by the vagueness of the order in this case. It is unclear from reading the order exactly what Mrs. Bradford is expected to re-create. Certainly the musical play *Your Arm's Too Short to Box with God* is such a famous and oft-performed musical that there are many copies of the work other than in Mrs. Bradford's head (if it is in fact in her head -- an allegation her counsel denies). And, according to the record in this case, Blue Pearl has a videotaped copy of the musical work *Don't Cry Mary, or What's a Friend For* performed on television by Mrs. Bradford. Thus, Blue Pearl apparently has independent access to copies of the only two musical works of Mr. Bradford that are mentioned by name in the record of this case. The record seems to indicate that there may be other works of Alex Bradford that have been lost, but if it is these unnamed musical works that are the subject of the district court's re-creation order then the order is certainly too vague to survive appellate scrutiny.

would support the extreme remedy of re-creation.[4] We therefore conclude that the district court exceeded its authority in ordering Mrs. Bradford to re-create the lost copyrighted works of her deceased husband.[5]

IV.

For the reasons stated above, we will affirm the district court's denial of Mrs. Bradford's motion to vacate the default judgments. However, we will vacate the March 2, 1983, order to the extent the it requires Mrs. Bradford to "re-create" her deceased husband's copyrighted works,[6] and we will remand to the district

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4. If, for example, the record disclosed that the appellant had stolen the only copies of the musical works in question from the appellee and then destroyed them, and the record further disclosed that she had committed the works to memory, that she was technically competent to re-create them, and that she was the only person in the world who could re-create the lost material, then an order to "re-create" might arguably be permissible. However, we see no facts in the record even approaching this hypothesized scenario. Indeed, the record is curiously silent as to why Blue Pearl, the owner of the copyrighted works in question, no longer has any copies of the materials. Certainly there is nothing in the record that suggests that it is the appellant's fault that the appellee has lost all copies of Mr. Bradford's musical works.

5. We note by way of contrast with the order to re-create, that the district court's June 26, 1981, order requiring Mrs. Bradford to "forthwith deliver over to Blue Pearl Music Corporation all manuscripts, leadsheets, and other documents together with all copies thereof, which embody the literary, dramatic, choreographic, artistic, and/or other literary works of Alex E. Bradford, ...", is expressly authorized by the Copyright Act. *See* 17 U.S.C. § 503.

6. In her appeal Mrs. Bradford raises thirteenth amendment objections to the district court's re-creation order. We do not reach this constitutional contention because we vacate the re-creation order on the narrower ground that the district court abused its discretion.

court for further proceedings consistent with this opinion.[7]

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7. The appendix prepared by the appellant did not contain all the materials required by court rule and was not properly paginated. For the convenience of the court, the appellee prepared a supplemental appendix that conformed with rule 30(a) of the Federal Rules of Appellate Procedure and rule 10(3) of this court. Since the cost of preparing an adequate appendix is normally borne by the appellant, *see* Fed. R. App. P. 30(b), we will order that the appellant reimburse the appellee for its cost in preparing the supplemental appendix.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)